

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

LONG BEACH UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N2005070425

**DECISION**

Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on January 17, 18, 19, and 20, 2006 and March 20, 21, 22, and 28, 2006 in Long Beach, California.

Petitioner Student was represented by attorney Tania L. Whiteleather. Also present for Student was advocate Rodney Ford. Student's Mother was present at the hearing on the dates that she testified.

Respondent Long Beach Unified School District (District) was represented by attorney Debra K. Ferdman. Also present for the District was Sara Jocham, SELPA Administrator.

**PROCEDURAL HISTORY**

On June 29, 2005, Student filed a mediation and due process hearing request with the Special Education Hearing Office (SEHO).<sup>1</sup> On July 15, 2005, the parties agreed to take the matter off calendar.

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<sup>1</sup> On July 1, 2005, the California Department of Education transferred the responsibility to hear special education cases from SEHO to OAH, including cases filed prior to July 1, 2005, but not yet heard by SEHO.

At the conclusion of the due process hearing on March 28, 2006, the record was held open for the parties to file written closing briefs. Closing briefs were timely received from both parties and marked for identification as Student's Exhibit CCC and District's Exhibit 44, respectively. The record was closed and the case was submitted on April 21, 2006.

## ISSUES

1. Did the District appropriately assess Student in all areas of suspected disability for the 2002-2003, 2003-2004, and 2004-2005 school years, and conduct an appropriate triennial assessment in 2004?
2. For the three school years at issue, did the District deny Student a free appropriate public education by failing to identify and address his unique educational needs in a manner that allowed him to make appropriate educational progress?
3. Did the District comply with the procedural requirements of IDEA in providing Student's parents with prior written notice when it declined their August 11, 2005, request for an intensive Lindamood Bell Learning Process program?<sup>2</sup>
4. Are Student's parents entitled to reimbursement of their expenses incurred for the Lindamood Bell Learning Process program during the 2004-2005 and 2005-2006 school years?

## CONTENTIONS OF THE PARTIES

This case involves the 2002-2003, 2003-2004, and 2004-2005 school years.<sup>3</sup> Student contends the District failed in each of the school years to appropriately assess him in all areas of suspected disability, specifically in the areas of attention, auditory processing, and phonemic awareness.<sup>4</sup> Student also contends that the District's March 2004 triennial

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<sup>2</sup> Issue No. 3 was not identified in Student's request for due process hearing filed with SEHO on June 29, 2005. However, it was later identified in Student's Prehearing Conference Statement dated December 27, 2005. On January 9, 2006, the District filed a motion to dismiss Issue No. 3 on the grounds it was a "frivolous claim." At the start of the due process hearing on January 17, 2006, the District's Motion was taken under submission. The District's Motion is hereby denied so that a ruling on the merits of Issue No. 3 can be made as part of this decision. For purposes of this Decision, Issue No. 3 has been restated based on the opening argument made by Student's counsel at the start of the due process hearing. Student's closing brief did not address Issue No. 3.

<sup>3</sup> In his Closing Brief, Student alleges the District failed to provide him a FAPE "from June, 2002 through the present." Similarly, the Prehearing Conference Order issued by ALJ Vincent Nafarrete on December 30, 2005, identified the school years at issue in this matter as "the three school years from 2002 through 2005."

<sup>4</sup> Phonemic awareness refers to the ability to recognize phonemes and put sounds together to form words and phrases quickly, accurately, and automatically. Phonemic awareness is essential for decoding, which is a receptive language skill that allows a child to understand and make use of auditory or visual information. In connection with reading, decoding is the ability to recognize words one has previously learned and discern the meanings of new words from sound or context.

assessment was not appropriate because it did not include standardized testing. Student contends that, because of the failure to conduct appropriate assessments, the District lacked sufficient information to identify and address his unique educational needs and develop a program that would allow him to make “appropriate educational progress,” which Student asserts means “year-for-year progress.” Student also contends the District failed to provide prior written notice when it refused his Mother’s request for reimbursement of the cost of a private 12-week Lindamood Bell reading program Student attended in the fall of 2005. Student’s Mother seeks reimbursement from the District in the amount of \$21,330.00, plus loan costs of \$1,000.00 and transportation costs.

The District contends it appropriately assessed Student for the school years at issue, and that identifying Student’s unique educational needs has never been a problem. The District also contends it developed appropriate educational programs for Student that provided him educational benefit and allowed him to make educational progress. The District further contends it complied with its obligation to provide prior written notice of its decision to deny Mother’s request for reimbursement, and that Mother is not entitled to reimbursement for the Lindamood Bell program.

## FACTUAL FINDINGS

### *Background*

1. Student is a 14-year-old boy who resides within the jurisdictional boundaries of the District. He is a special education student who receives designated instruction and services (DIS) and resource specialist program (RSP) services on a pull-out basis, but otherwise attends general education classes.

2. Student has received special education services since December 1996, when the District determined he was eligible for special education services based on a speech or language disorder in the areas of articulation, morphology, and syntax.

### *District’s Assessments*

3. A school district is required to assess special education students in all areas of suspected disability. Assessments shall occur at least once every three years or more frequently if conditions warrant or if requested by a parent or teacher.<sup>5</sup>

### *2001 Psychoeducational Assessment*

4. Although the 2001 school year is not at issue in this case, it is necessary to review the District’s 2001 assessments in order to determine whether the District

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<sup>5</sup> Effective October 1, 2005, Education Code section 56381 was changed to provide, in part, that reassessments shall occur at least once every three years unless the parent and school district agree in writing that a reassessment is unnecessary. (Ed. Code, § 56381, subd. (b)(2).)

appropriately assessed Student in all areas of suspected disability in the following 2002-2003 school year.

5. Pursuant to an assessment plan dated February 5, 2001, and signed by Mother, the District's school psychologist, Ruth D. Alcalde, conducted a psychoeducational assessment of Student in March 2001 in preparation for Student's March 27, 2001 triennial individualized educational program (IEP). At the time of this assessment, Student was a third grader at Mark Twain Elementary School.

6. The school psychologist conducted interviews, made observations, reviewed records, and administered several standardized tests. Student's unique educational needs were identified and assessed in the areas of cognitive abilities, academic skills (reading, writing, and math), listening/oral comprehension, processing skills, attention and concentration, and speech and language functioning. The overall conclusion of the 2001 psychoeducational assessment was that Student "demonstrates a weakness in verbal memory/auditory processing deficits, which may be manifested in difficulty storing information, recalling information, and retrieving information. This auditory deficit is negatively impacting his reading and written language skills."

7. Student's cognitive ability was estimated to be within the average range. The results of the Kaufman Brief Intelligence Test (K-BIT) showed Student's overall cognitive ability was in the lower limits of the average range, and there was a "statistically significant delay" in his verbal ability when compared to the normal development of his nonverbal ability.

8. Student's academic skills, as measured by standardized tests and classroom benchmarks, indicated his math skills were developing within the average range,<sup>6</sup> his reading and written language skills were in the low-average range, and his oral language skills were at the borderline to low-average range. Student's reading skills were measured at approximately the 2.1 to 2.4 grade level, and his reading comprehension skills were estimated at the approximately 2.5 to 2.9 grade levels. In reading, Student had a tendency to give up easily when decoding unfamiliar words, guessing instead of using decoding strategies, not using context clues when reading difficult words, making concrete/literal interpretations of what he read, and showing low critical thinking and inferencing skills when answering comprehension questions. Student's written expression skills were estimated at a second grade level. He could write a basic paragraph if prompted and when directions were explained to him individually. However, Student appeared to have difficulty retrieving words and putting his thoughts down on paper.

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<sup>6</sup> Math was not an area of suspected disability at this time, since Student's math skills were at his grade level (i.e., third grade) and developing within normal limits.

9. Student's listening comprehension<sup>7</sup> and oral expression skills were estimated at a 1.1 grade level. The results of the Wechsler Individual Achievement Test (WIAT) indicated Student's listening comprehension skills were hampered by difficulties with sequencing, predicting events and outcomes, recognizing stated cause and effect, comparing and contrasting, recognizing stated detail, and inferring and drawing conclusions. Student also appeared to have difficulty retrieving words when expressing himself orally, and often needed prompting and probing to help him complete his thoughts.

10. Student's processing skills were developing adequately in the areas of visual perception, motor coordination, planning processes, and simultaneous processing. However, successive processing was identified as an area of weakness.<sup>8</sup> Student appeared to have borderline ability to process successive/sequential auditory information, based on observations of Student and his performance on the successive cluster of the Cognitive Assessment System (CAS). Student displayed the following classroom problems related to successive processing: low word decoding skills, failure to comprehend syntax structure, failure to remember/reproduce a sequence of words accurately (i.e., verbal directions), difficulty in following steps or omitting steps in order to solve problems, and lack of comprehension of the sequence of events in a story.

11. Student had an overall low-average ability to control his attention<sup>9</sup> and concentration. Student was better able to attend and control his activity level when he understood and was able to follow verbal directions. He appeared able to follow directions that were re-explained to him individually. Student's attention and concentration difficulties, and at times limited effort, appeared to be secondary to his auditory processing and language deficits. Although the attention difficulties could be a compounding factor, Student's auditory processing deficit appeared to best explain the academic difficulties he was experiencing in the classroom.

12. Student's speech and language specialist reported that Student made "good and steady progress" in meeting his IEP goals in speech and language. Student's overall receptive language was in the low-average range, his expressive language was in the low-average to significantly-below-average range, and his language processing scores were "significantly depressed." Student demonstrated difficulty in the area of semantics (i.e., vocabulary used to categorize items, define words, describe similarities and differences between items, and define multiple meanings of words). Student's oral expression was at least two years below age expectancies in terms of sentence length and complexity.

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<sup>7</sup> The school psychologist identified Student's auditory processing needs as "listening comprehension (auditory processing)."

<sup>8</sup> Successive processing is a mental process used to put information in a specific order. It involves remembering information in order as well as the formation of sounds and movements in order and, thus, is highly involved with blending of sounds to form words as well as the syntax of language.

<sup>9</sup> Attention is a mental process by which the individual selectively focuses on particular stimuli while inhibiting responses to competing stimuli presented over time.

13. Based on the 2001 psychoeducational assessment, the District identified as Student's unique educational needs that he had average cognitive abilities, he was approximately one year below grade-level in his reading and writing skills, and his listening comprehension and oral expression skills were about two years below grade-level. The District was also aware Student had a weakness in verbal memory/auditory processing that could be manifested in difficulty storing, recalling, and retrieving information, and that this auditory deficit was negatively impacting his reading and written language skills. The District also identified attention and concentration as areas of need.

*Assessments for 2002-2003 and 2003-2004 School Years*

14. For the 2002-2003 school year, Student was a fifth grader at Mark Twain Elementary School. The March 27, 2002 IEP was the operative IEP at the start of this school year. This IEP identified Student's areas of suspected disability and unique educational needs based on the District's March 2001 psychoeducational assessment. Mother consented to this IEP and did not express concern about any other needs or request additional assessments. Student had no other areas of suspected need or concern to warrant further assessment by the District. Although Student was below grade level in reading and writing, Student was making educational progress. As of March 2002, Student met the prior year's (2001) IEP goals in writing and language arts. He could write a one paragraph story using a story web and use specific language to describe categories with 90 percent accuracy and similarities/differences with 100 percent accuracy. In addition, Student made progress on his two reading goals. Student could answer basic comprehension questions after reading a short story with 48 percent accuracy, where the goal was 80 percent accuracy. Student could sequence orally-read short stories with 40 percent accuracy, where the goal was 80 percent accuracy.

15. For the 2003-2004 school year, Student was a sixth grader at Bancroft Middle School. The March 25, 2003, IEP was the operative IEP at the start of this school year. This IEP identified Student's areas of suspected disability and unique educational needs based on the District's March 2001 psychoeducational assessment. Mother consented to this IEP and did not express concern about any other needs or request additional assessments. Student had no other areas of suspected need or concern to warrant further assessment by the District. As of March 2003, Student was making educational progress. Student met the goals from the prior year's (2002) IEP in that he could write three paragraphs using a story web, sequence a story orally, answer main idea questions after reading a short story, and provide synonyms for words at his reading level. Although Student's reading skills were below grade level, he progressed from benchmarking at the end-of-third-grade level in 2002 to benchmarking at the mid-fourth grade level in 2003. Similarly, Student's writing skills progressed from a second grade level in 2002 to a third grade level in 2003.

16. The District complied with its obligation to assess Student in all areas of suspected disability for the 2002-2003 and 2003-2004 school years.

### *2004 Triennial Assessment*

17. In March 2004, school psychologist Vivian Holliday completed Student's triennial assessment and prepared a written "Summary of three-year review" report dated March 25, 2004. Ms. Holliday conducted interviews of Student, his parent, and teacher. Ms. Holliday reported Mother was "pleased with [Student's] progress." Ms. Holliday also reviewed records, teacher reports, and the psychoeducational assessment report from Student's last triennial assessment in March 2001. Ms. Holliday found Student had made "steady progress since his last triennial IEP." Based on the information obtained and reviewed, Ms. Holliday determined that no additional information or assessments were needed in order to provide appropriate educational and support services to Student. Ms. Holliday's report, which was sent to Mother, notified Mother that she could "request additional assessments at any time." Ms. Holliday recommended Student continue receiving special education services through the RSP program at Bancroft Middle School. She also recommended implementation of "self-monitoring strategies to increase the amount of time [Student] is able to attend."

### *Assessments for 2004-2005 School Year*

18. For the 2004-2005 school year, Student was a seventh grader at Bancroft Middle School. The March 25, 2004 IEP was the operative IEP at the start of this school year. This IEP identified Student's areas of suspected disability and unique educational needs based on the District's 2001 psychoeducational assessment and 2004 triennial assessment. Mother consented to this IEP and did not express concern about any other needs or request additional assessments. Student had no other areas of suspected need or concern to warrant further assessment by the District. As of March 2004, Student was making educational progress. Student could write three to five paragraphs using a graphic organizer and independently wrote a five paragraph essay. Student earned a "B" in math class and was proficient in basic math facts. Student made progress on his reading goal. Student benchmarked at the mid-fifth grade level in fiction and the mid-fourth grade level in non-fiction, where the goal was to benchmark at the mid-fifth grade level in both fiction and non-fiction. The District complied with its obligation to assess Student in all areas of suspected disability for this school year.

### *May 2005 Assessments*

19. On March 24, 2005, the District held a meeting to conduct an annual review of Student's IEP. The meeting did not conclude on March 24, 2005, and the IEP team agreed to reconvene after additional assessments were completed.<sup>10</sup> Pursuant to an assessment plan dated March 25, 2005, and signed by Mother on April 13, 2005, Student was assessed by school psychologist Dan Sullivan regarding his academic, cognitive, processing, and behavior needs, and by District employee Sue Buckley regarding whether the District's

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<sup>10</sup> The March 24, 2005, annual IEP was developed over four separate meetings held on March 24, 2005, May 31, 2005, and June 2 and 6, 2005. Mother was present at the four meetings with her advocate Rodney Ford.

Lindamood Bell program would be appropriate for Student. The assessment by Ms. Buckley was in response to Mother's request that the District assess Student for the "District Lindamood Bell program."

### *2005 Psychoeducational Assessment*

20. On May 10, 2005, school psychologist Dan Sullivan conducted a psychoeducational assessment of Student. Mr. Sullivan conducted interviews, made observations, reviewed records, administered several tests, and prepared a written report. Mr. Sullivan found Student was a friendly student with a conversational level typical for his age peers. Student cooperated during testing and was generally attentive to the tasks presented, although he appeared to work too fast in an attempt to end the task quickly, causing him to make careless errors. Mr. Sullivan also observed Student was frequently inattentive to class work activities.

21. Mr. Sullivan administered several standardized tests. Based on the results of the Matrix Analogies Test Expanded Form (MAT-EF), Student's ability to reason and make inferential conclusions was not as well developed as his other cognitive skills. The results of the Woodcock Johnson II Tests of Achievement indicated Student's academic skills and his ability to apply those skills were in the low-average range, his fluency in academic tasks was average, his skills in math, math calculation, and written expression were average, and his skills in reading and written language were low-average. On the Ordinal Scales, which is a time trial problem-solving situation requiring the use of short and long term memory and spatial skills, Student scored equal to his age peers. The BASC Parent Report Survey identified Student's areas of concern as a short attention span, trouble concentrating, easily distracted, and overly active. Mr. Sullivan received responses from Student's teachers showing areas of concern similar to those identified in the parent's survey responses.

22. The Test of Auditory-Perceptual Skills-Revised (TAPS-UL) is a standardized test used to assess various areas of a subject's auditory-perceptual skills (i.e., the subject's ability to perceive auditory stimuli, process the stimuli, such as discriminate, understand, interpret, and express). On the TAPS-UL, Student's score was average for his age peers, which indicated to Mr. Sullivan that Student could process verbally presented material without undue difficulty. Mr. Sullivan's opinion is that Student did not have an auditory processing problem. If Student had an auditory processing problem, then he would be expected to consistently have the problem. However, the results of the TAPS-UL indicated Student could process verbally presented material.

23. Mr. Sullivan found Student was progressing toward meeting his academic goals despite his processing limitations in the area of attention. Because of his attention issues, Student sometimes could not maintain the intensity level needed to address new and difficult learning tasks. Mr. Sullivan found Student needed "clear rules, precise instructions, organized materials, and the use of frequent feedback from adults to improve his performance." Because Student responded well to verbal praise, Mr. Sullivan recommended using positive verbal instructions to redirect Student's attention toward his assignments. Mr.



Sullivan recommended Student “continue in the RSP Strategies for Success Program at his school, with regular accountability for his work.”

24. Mr. Sullivan’s testimony was credible and persuasive. Based on his education and experience, he was qualified to testify as to his opinions in this matter. Mr. Sullivan assessed Student, attended IEP meetings, and was familiar with his unique educational needs. Mr. Sullivan testified in an honest and straightforward manner, and he seemed genuinely concerned about Student’s progress. Student failed to present credible or persuasive evidence to refute Mr. Sullivan’s testimony. As rebuttal, Student offered the testimony of Dr. Christine Davidson, who is a licensed educational psychologist. Dr. Davidson lacked a factual foundation from which to testify about Student’s needs because she did not attend the IEP meetings nor assess Student nor talk to his teachers. Dr. Davidson only reviewed Student’s records. Her testimony as to her personal practices is not probative as to whether or not the IEPs developed by the District were appropriate for Student. Consequently, Dr. Davidson’s testimony could not be given as much weight as Mr. Sullivan’s testimony.

25. In his Closing Brief, Student asserts the District should have conducted an assessment for a specific learning disability, which required standardized testing and observations of Student. However, no evidence was presented establishing Student was determined to have a specific learning disability. Nor was any evidence presented that Student’s eligibility for special education was in a category other than speech or language impairment. Student’s eligibility for special education services has never been disputed by the District. Once Student was found eligible for special education services, his educational program was developed based on his unique educational needs and not merely his category of eligibility.

#### *2005 Assessment for District’s Lindamood Bell Program*

26. The District operates its own Lindamood Bell clinics at the elementary school, middle school, and high school levels. The clinics were set up by the District in consultation with Lindamood Bell consultants, who also provided training to the District’s teachers and prepared the lesson plans used in the District’s program. Two of the District’s Lindamood Bell programs are provided at Stanford Middle School and Madison Elementary School.

27. On May 13, 2005, Student was assessed for the District’s Lindamood Bell program by Sue Buckley. Ms. Buckley currently works part-time for District in the area of special education. Previously, Ms. Buckley was a resource specialist for 11 years and was a teacher for 25 years for grades three through seven. She has a learning handicap credential and special education credential. Ms. Buckley is trained in and familiar with the Lindamood Bell programs.

28. Ms. Buckley administered several tests for the assessment. The Peabody Picture Vocabulary Test III, which measures receptive vocabulary, indicated Student had sufficient background to benefit from the Lindamood Bell program. The Word Attack test (from the Woodcock Reading Mastery Test) is used to measure decoding abilities and

indicated Student had limited decoding skills that affected his comprehension of more difficult texts. The Wide Range Achievement Test-Revised/3 (WRAT), which involves sight word reading, indicated Student was at a third grade level and had limited ability. On the Gray Oral Reading Test 4 (GORT-4), which measures comprehension skills, Student's skills were at mid-third grade level. Ms. Buckley found that during reading, Student would "slide" over words he did not know or could not decode (usually multi-syllable words), which apparently caused him to lose the meaning of the passage. Based on her assessment, Ms. Buckley recommended the Lindamood Bell Visualizing and Verbalizing (comprehension) and Seeing Stars (spelling/reading) programs for Student to help him develop comprehension and decoding strategies. Ms. Buckley's testimony was credible and undisputed. The parties agree that Lindamood Bell is an appropriate and beneficial program for Student. When Student was assessed by the Lindamood Bell Newport Beach clinic, the clinic recommended the same Lindamood Bell programs for Student as Ms. Buckley, namely, the Visualizing and Verbalizing and Seeing Stars programs.

29. In summary, Student, as petitioner, did not meet his burden of proving his contention that the District failed to assess him in all areas of suspected disability. The evidence established that, for the three school years from 2002 through 2005, Student did not have an area of suspected disability or need that had not been identified and assessed by the District. Student's specific contention that the District failed to identify his needs in the areas of attention, auditory processing, and phonemic awareness was not proven.

*FAPE - Address Unique Educational Needs and Provide Educational Benefit*

30. A school district has offered a FAPE when it offers a special education program that is designed to address the student's unique educational needs and is reasonably calculated to provide him some educational benefit.

*2002-2003 School Year (5th Grade)*

31. The IEP in effect at the start of the 2002-2003 school year was developed at an annual IEP meeting held on March 27, 2002. Mother was present and participated in the meeting. She was also given a copy of her parental rights.

32. In the March 27, 2002 IEP, Student's unique educational needs, based on a continuing "language disorder," were identified as a "weakness in verbal memory/auditory processing" which impacted his performance in reading and writing, below grade-level skills in reading (third grade level) and writing (second grade level), difficulty answering high level skills reading comprehension questions, difficulty focusing his attention, poor study and organizational skills, and giving up easily due to a low frustration level. The IEP team found Student's low accuracy level in answering basic reading questions and in sequencing orally read stories was largely due to his lack of motivation in speech, since he achieved high accuracy levels in meeting the language arts goal of using language to describe categories (90 percent accuracy) and similarities and differences (100 percent accuracy).

33. The March 27, 2002 IEP was designed to address Student's unique educational needs. In developing the IEP, the team reviewed Student's present levels of educational performance and his performance on the prior year's IEP goals. Based on that review, the IEP team developed goals and objectives that required Student to answer main idea and inference questions at 70 percent accuracy after reading a short story, write three to four paragraphs (including topic sentences, supporting details, and a conclusion) using a story web, sequence orally read short stories with appropriate syntax, and provide synonyms for words at his reading level. The IEP team determined that Student continued to require DIS and RSP support in the general education setting to progress in his educational environment. The IEP team recommended DIS in speech and language (once a week, 25 minute session), RSP services in reading (twice a week, 30 minute sessions) and written language (once a week, 30 minute sessions), and instructional accommodations consisting of the use of charts, visual aides, story web, and organizers, concise and simplified directions, preferential seating, shortened or modified assignments, the teacher checking for understanding and using prompts and cues to help Student stay on-task and complete assignments, and allowing Student additional time to respond. The March 27, 2002 IEP recommended that Student attend summer school. Mother consented to the March 27, 2002 IEP.

34. In June 2002, Student attended the District's Lindamood Bell summer program at Madison Elementary School (also known as the Madison Summer Reading Clinic). Student benefited from the program, as he showed improvement in the "Seeing Stars" program for spelling and reading words.

35. At the start of the 2002-2003 school year, which was Student's fifth grade year, he was receiving speech and language services once a week in the speech room. In October 2002, the District recommended increasing the frequency of Student's speech and language services from once a week to twice a week, so there would be more time available for Student to work on his IEP goals. Student's motivation and participation were reported to have "increased significantly" that fall semester. An addendum IEP meeting was held on October 24, 2002, where Student's speech and language services were increased to twice a week. Mother did not attend the meeting but consented to the District holding the meeting without her. Mother consented to the October 24, 2002, addendum IEP.

36. Three months later, in January 2003, Mother made a request to the District to change Student's speech and language services from direct service, small group to a "watch and consult" basis. "Watch and consult" meant that Student would receive speech and language services in his general education classes on an "as needed" basis, as determined by the speech provider's consultations with Student's teachers and/or parent. Mother requested this change because she felt Student's progress was "at a stand still" and he "requires more time in regular class." On February 4, 2003, the District held an addendum IEP meeting to discuss Mother's request. Mother did not attend the meeting but consented to the District holding the meeting without her. The IEP team agreed to make the change requested by Mother. The IEP team agreed that Student's goals for sequencing orally read short stories and knowledge of synonyms would be addressed in both the general education and RSP settings with speech and language consultation support. The IEP team also wrote a new goal

to address Student's difficulty recalling details, sequencing, and answering inference questions. Mother consented to the February 4, 2003, addendum IEP.

37. Patricia Duffy was Student's RSP teacher during his fifth grade year. In working with Student, Ms. Duffy found that he had difficulty with attention and distraction. However, she was able to redirect his attention, and also found it easier to keep him on-task by working with him in a small group rather than a large group.

38. A comparison of Student's performance levels in March 2002 with his March 2003 levels shows that he received educational benefit and made educational progress. Student's reading skills progressed from a third grade level in 2002 to benchmarking at the mid-fourth grade level in 2003. By March 2003, Student met his 2002 IEP goals of sequencing orally-read short stories and providing synonyms for 20 words at his reading level. Student also partially met his 2002 reading goal in that he could answer main idea questions, but he still had difficulty with higher level comprehension questions (e.g., inference, compare and contrast). Student's writing skills progressed from a second grade level in 2002 to a third grade level in 2003. Student could write two to three paragraphs using a story web in 2003, as compared to the previous year when he was writing only one to two paragraphs. In addition, Student's fifth grade report card showed he made educational progress. The report card showed improved ratings from the beginning of fifth grade to the end of fifth grade in language arts (reading/literature, writing/spelling, and speaking). Student also made progress in his work and study habits in that several areas that were rated as "needs to improve" at the beginning of fifth grade were rated either "satisfactory" or "excellent" at the end of fifth grade.

39. For the 2002-2003 school year, the District complied with its obligation to identify and address Student's unique educational needs in a manner that allowed him to make appropriate educational progress.

#### *2003-2004 School Year (6th Grade)*

40. The IEP in effect at the start of the 2003-2004 school year was developed at an annual IEP meeting held on March 25, 2003. Mother was present and participated in the meeting, and given a copy of her parental rights.

41. In the March 25, 2003 IEP, Student's unique educational needs, arising from his difficulties with semantics, syntax, and processing, were identified as a "weakness in verbal memory/auditory processing," below grade-level skills in reading, writing, and math, difficulty with higher level reading comprehension questions (i.e., inference, compare, and contrast), difficulty organizing his thoughts and putting them down on paper, difficulty focusing his attention and staying on task, requiring teacher prompts and cues to start and complete assignments, and poor organizational and study skills.

42. The March 25, 2003 IEP was designed to address Student's unique educational needs. In developing the IEP, the team reviewed Student's present levels of educational

performance and his performance on the prior year's IEP goals. Based on that review, the IEP team developed goals and objectives in the areas of reading, writing, and math. The reading goals required Student to benchmark at the mid-fifth grade level with modifications in fiction and non-fiction and answering seven out of ten comprehension questions correctly, and to read a short story at his reading level and answer inference questions with teacher prompts 70 percent of the time. The writing goal required Student to write a report with four to five paragraphs, using a story web, including an introduction, details, and a conclusion, 70 percent of the time. The math goal required Student to add and subtract mixed fractions with 70 percent accuracy.

43. At the March 25, 2003 meeting, the IEP team determined Student required support in the general education setting in order to progress in his educational environment. The IEP team recommended DIS in speech and language on a "watch and consult" basis (15 minutes/month) as per Mother's request, RSP services in reading (three times per week, 30 minutes), written language (once a week, 30 minutes), and math (once a week, 30 minutes), and the same accommodations recommended in the March 27, 2002 IEP with the addition of pairing auditory directions with visual cues, breaking down complex tasks into smaller units, and allowing the use of highlighters and a tape recorder. The IEP team also recommended that Student attend summer school or another enrichment program. Mother consented to the IEP developed at the March 25, 2003 meeting.

44. Melissa James was Student's RSP math teacher for sixth grade. She worked with Student approximately one hour per day, five days per week. She found that Student had some difficulties in the areas of basic math facts and integers (add, subtract, multiply, and long division), but he knew his multiplication tables. Ms. James found Student was quick to complete his work, but was not open to re-doing or correcting his work, nor working at a slower pace. When Student did not complete his class work, Ms. James would ask him to slow down, go back and re-do his work. She also contacted Mother to talk to Student about completing his work. Ms. James would allow Student the opportunity to complete his work in her class the next day or for homework.

45. On January 23, 2004, the District held an addendum IEP meeting to discuss Mother's request to change Student's RSP English and reading classes to general education classes. Mother was present and participated in this meeting. Ms. James, Student's RSP teacher, was also present at this meeting and expressed her disagreement with Mother's request. Ms. James testified that Mother wanted Student mainstreamed and felt that special education was not needed. At the end of the meeting, the IEP team acceded to Mother's request and changed Student's RSP English and reading classes to general education English and reading development. Student's progress would be monitored and classes and support would be reviewed at the triennial IEP meeting upcoming on March 25, 2004. In addition, the IEP team recommended increasing Student's RSP math from one time per week to five times per week (50 minutes/day) through March 27, 2004. Mother consented to the January 23, 2004, addendum IEP.

46. Student received educational benefit and made educational progress, as shown by a comparison of his March 2003 performance levels with his March 2004 levels. Student's reading skills progressed from a mid-fourth grade level in 2003 to passing the mid-fifth grade benchmark in fiction and passing the mid-fourth grade benchmark in non-fiction in 2004. His most recent reading inventories placed him at a fourth grade level. Student was at 33 percent accuracy in answering inferential questions after reading a short story or paragraph, where the goal was to reach 70 percent accuracy. Student's writing skills progressed from being able to write two to three paragraphs using a story web in 2003 to writing three to five paragraphs using a graphic organizer. By March 2004, Student was also starting to follow the writing process using simple sentence structure, and he independently wrote a five paragraph essay. Student's math skills progressed in that he was proficient in basic math facts (i.e., add, subtract, and multiply multiple digits), but he was not yet proficient at dividing multiple digits. As of March 2004, Student brought his grade up to a B in math class. In addition, Student's English teacher reported that he was approaching the teacher for clarification of instructions and assignments. In history class, Student turned in all his assignments and earned a grade of B. Student communicated effectively with his peers and adults.

47. For the 2003-2004 school year, the District complied with its obligation to identify and address Student's unique educational needs in a manner that allowed him to make appropriate educational progress.

#### *2004-2005 School Year (7th Grade)*

48. The IEP in effect at the start of the 2004-2005 school year was developed at an annual IEP meeting held on March 25, 2004. Mother was present and participated in the meeting.

49. In the March 25, 2004 IEP, Student's unique educational needs, based on a communication disorder in semantics, syntax, and processing, were in the areas of reading, writing, math, language development, attention and staying on task, and study skills. Student continued to have difficulty with inferencing. In math, he was not yet proficient in dividing multiple digits. Student still required prompting to stay focused, but teachers noted he was showing improvement in controlling off-task behaviors.

50. The March 25, 2004 IEP was designed to address Student's unique educational needs. In developing the IEP, the team reviewed Student's present levels of performance and evaluated his performance on the prior year's IEP goals. Based on that review, the IEP team developed goals and objectives that addressed Student's unique educational needs in reading and writing. The writing goal required Student to write an expository composition with a proficient introduction, body and conclusion, using a graphic organizer and following the writing process. The reading goals required Student to benchmark at the end-of-fifth-grade level in fiction and non-fiction, and to answer inferential questions after reading a paragraph or short story at his reading level, with 80 percent accuracy without cues. A math goal was not written in the 2004 IEP. Instead, Student's math needs were addressed through an

increased level of RSP math services (five times per week, 55 minutes/session).<sup>11</sup> The IEP team determined that Student continued to require additional support to access the general education curriculum. The IEP team recommended DIS in speech and language, direct service (once a week, 20 minutes/session), RSP math as previously noted, and RSP study skills (three to five times per week, 165-275 minutes total). The IEP team recommended Student receive accommodations of extended time, teacher clarifying directions and checking for understanding, and on-task reminders. Mother consented to the March 25, 2004 IEP.

51. Strategies for Success (SFS) is an RSP class that teaches study skills and strategies for pupils to use in a general educational classroom, and also provides pupils with content support. SFS includes a “study skills” class where the RSP teacher helps pupils organize their work and also provides help with their other classes.

52. In the latter half of his sixth grade year, Student attended the SFS class taught by Nancy Walker, who was Student’s case carrier for sixth grade. Ms. Walker worked with Student on a daily basis when he was in her class. Ms. Walker worked with Student on his IEP goals and study skills, and also provided content area help for his other classes. Ms. Walker found Student had attention issues such as talking during classroom instruction, requiring instructions and content information to be repeated for him, and looking away and not focusing on his work. Ms. Walker addressed the attention issues by refocusing and redirecting Student, giving him cues to start working, and checking his understanding. She also had other pupils around Student repeat information for him. Ms. Walker also provided assistance to Student in his general education classrooms. Ms. Walker’s opinion is that it was beneficial for Student to be in the SFS program. Her opinion is that Student can work slowly and compensate for his deficits, but he cannot overcome them. Ms. Walker worked with Student on compensation strategies to improve his organization skills, note taking, and reading text. Ms. Walker found, however, Student was “not always” receptive to her help.

53. At the start of Student’s seventh grade year, in September 2004, Mother requested that Student not be pulled out of his physical education class to attend the SFS class. On September 15, 2004, the District held an addendum IEP meeting to discuss Mother’s request. Mother was present and participated in this meeting. After the meeting, the IEP team acceded to Mother’s request. Strategies for Success was deleted from Student’s IEP, and RSP study skills was changed from direct service to “watch and consult” (60 minutes per month).

54. As noted in Factual Finding 19, the District held an annual IEP meeting on March 24, 2005, the meeting did not finish on that date, and the IEP team agreed to reconvene after additional assessments were completed. Among other things, the IEP team discussed the services that would be implemented for Student until the assessment results were available. At the time of the March 24 meeting, Student was receiving RSP study skills

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<sup>11</sup> Student’s RSP math services were increased from once a week in 2003 to five times a week in January 2004 (Factual Finding 45).

on a “watch and consult” basis but not receiving Strategies for Success per Mother’s September 2004 request. The IEP team recommended, and Mother consented, to changing back Student’s RSP service delivery from “watch and consult” to direct support through a Strategies for Success class (three times per week, 50 minutes/session) on a trial basis.

55. The March 24, 2005 annual IEP meeting reconvened on May 31, 2005, to discuss the results of the assessments completed by Mr. Sullivan and Ms. Buckley (Factual Findings 20-28), Student’s present levels of performance, goals and objectives, and recommendations for Student’s educational program and services. The IEP team determined that Student required RSP support to access the general curriculum. With respect to RSP services, the IEP team recommended Student attend Strategies for Success on a direct service basis (three times per week, 55 minutes) and an indirect service basis (one to two times per week, 10-20 minutes). The IEP team also recommended that Student attend the District’s Lindamood Bell five-week summer program at Stanford Middle School (also known as the Literacy Clinic) starting on June 27, 2005. The IEP team also recommended another session in the District’s Lindamood Bell program in the fall might be necessary, depending on the results of Student’s post-testing at the end of the summer program. Mother consented to the IEP developed over the four meetings commencing on March 24, 2005.

56. Julie McMann was Student’s seventh grade history teacher. Student was in Ms. McMann’s class from September 2004 until he was transferred to another history class in spring 2005 at Mother’s request.<sup>12</sup> While Student was in her class, Ms. McMann found that he liked to “clown” instead of participate in lessons. However, when Student paid attention, he could follow directions. He could also advocate for himself and ask for more instruction when he did not understand something. Ms. McMann observed Student had comprehension difficulty with the required history textbook. To address this difficulty, Ms. McMann would partner Student with another pupil with strong reading skills. Ms. McMann found that Student benefited from his partner’s explanations as well as teacher explanations. Ms. McMann found Student typically did not have vocabulary problems. Ms. McMann’s opinion is that, with accommodations, Student could access the seventh grade curriculum in her history class.

57. Student attended the SFS class taught by Melissa James, who was previously Student’s sixth grade RSP math teacher. In seventh grade, Ms. James provided support for Student in his math and language arts classes. She modified the curriculum, shortened assignments, and helped him take notes so he could complete his homework. Ms. James worked one-on-one with Student on reading, homework, math, research papers, and any other areas or assignments that he need assistance.

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<sup>12</sup> As established by Ms. McMann’s testimony, in March 2005, she gave an assignment to the class to prepare an outline of a report. Instead of an outline, Student turned in a draft of a report. Ms. McMann believed that Student did not prepare the draft report because, when she questioned him about some of the words in the report, Student did not know what they meant. Student did not receive credit for the assignment. Thereafter, Mother requested Student be transferred from Ms. McMann’s class.



58. A comparison of Student's performance levels in March 2004 with his performance levels in the following year's IEP (March 2005) showed he received some educational benefit and made educational progress in the reading. Student met his reading goal in that he could answer inferential questions at 70 percent accuracy in 2005, which was an improvement from the 33 percent accuracy level in 2004. Student also met his reading goal of stating the main idea and supporting details at the sentence and short paragraph level with 70 percent accuracy. In 2005, Student could decode and comprehend text independently, although his decoding and comprehension skills were below grade level.

59. Student also made educational progress in the area of speech and language. Speech and language specialist Terrilee Peirce attended the March 24, 2005 annual IEP meeting and presented her recommendation for exiting Student from speech and language services. Ms. Peirce provided speech and language services to Student from December 2004 to March 2005. Ms. Peirce found Student was functioning where expected and communicated effectively with peers and adults. Ms. Peirce found Student had "general" speech and language needs and skills that could be improved, but he did not have "significant needs." Ms. Peirce's opinion is that Student did not have significant auditory processing delays. Ms. Peirce found that in December 2004, Student had attention issues in that he needed lots of prompts to pay attention to a person or a task. Ms. Peirce found Student was not distracted but, rather, "noncompliant" and his attention issues were "intentional." Ms. Peirce found that as Student got to know her better, he cooperated more. Once he complied, Ms. Peirce found there were no more attentional issues. Ms. Peirce's testimony was credible. She was knowledgeable of Student's speech and language needs, and appeared sincere in her concern about Student's progress.

60. Despite his progress in reading and speech and language, Student's grades and classroom behavior did not reflect educational progress over the period from March 2004 to March 2005. As of March 2005, Student was receiving an F in math, a D in history, and a C in science. In addition, Student's teachers reported he had difficulty with authority, he was defiant, he did not take responsibility for his actions, he talked and socialized excessively in class, and he was not completing his class work and homework.

61. School psychologist Dan Sullivan opined that changes to Student's program requested by Mother, including changes to his SFS class, affected his educational progress. Mr. Sullivan believed that Student benefited from the SFS class. The SFS class was appropriate to address Student's need to improve his organizational skills because the SFS teachers would help Student organize his work, give him clear rules, precise instructions, organized materials, and provide him with frequent feedback. The RSP classes also addressed the need to keep Student regularly accountable for his work. Student had been in the SFS class for about one month before Mr. Sullivan's May 2005 assessment. Mr. Sullivan's opinion is that the SFS class met Student's needs because it provided him with organizational strategies, which enabled him to know what the expectations were in his classes, and also provided him with frequent reminders. Mr. Sullivan's opinion is that consistently holding Student accountable for his work was important to meeting his needs

because, at the core of Student's disability, was the "transference of responsibility" for his work. Mr. Sullivan's testimony was credible and persuasive.

62. For the 2004-2005 school year, the District complied with its obligation to identify and address Student's unique educational needs in a manner that allowed him to make appropriate educational progress. Although Student did not make educational progress as in the prior two school years, the lack of progress occurred after Student's removal, at Mother's request, from the Strategies for Success program. Supports that were deemed appropriate by the District to address Student's needs and allow him to make educational progress could not be provided due to Mother withdrawing her consent for those supports.

#### *Prior Written Notice*

63. A parent must be provided prior written notice when a school district refuses to change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. The notice must include, among other things, a description of the action refused by the school district and an explanation of why the district refuses to take the action.

64. Pursuant to his March 24, 2005, IEP, Student attended the District's Lindamood Bell summer program at Stanford Middle School, which ran from June 27, 2005 to July 28, 2005. Student's report card for the program showed improved scores on the Woodcock Johnson Word Attack (pre-test score of 3.4, post-test score of 8.0) and Passage Comprehension (pre-test score of 3.3, post-test score of 5.6). Student was absent for the post-testing given on the last day of the program (i.e., July 28, 2005).

65. By letter dated August 11, 2005, Rodney Ford, Student's advocate, notified the District that Student's parents decided to have Student attend the Lindamood Bell clinic in Newport Beach because "the District has failed to provide appropriate educational placement and services," and they would seek reimbursement from the District for cost of the program. The letter indicated Student would begin attending the Lindamood Bell Newport Beach clinic on September 6, 2005, for six hours per day of intensive services.

66. The District responded to Mr. Ford's letter by a letter dated September 6, 2005, by Sara Jocham, SELPA Administrator. In the September 6 letter, Ms. Jocham explained the District was not willing to reimburse Student's parents for the costs of Student attending the Lindamood Bell clinic in Newport Beach. The District believed the request for reimbursement was premature as the parties had not yet participated in a previously agreed to mediation, and the District had its own appropriate Lindamood Bell program to meet Student's needs. Student had just attended the District's Lindamood Bell program at Stanford Middle School in June and July 2005. The September 6th letter also included an offer by the District to "provide a full-day six week intensive program of Lindamood Bell for [Student] at Stanford Middle School," including transportation to and from the Stanford Lindamood Bell program. The District also offered to hold an IEP team meeting at the conclusion of the six-week program to discuss Student's progress in the program and the

necessity of any further interventions. The September 6th letter contained the statutorily required information for prior written notice. Given that Mr. Ford's letter was sent during the summer vacation period, the District's September 6th response was made within a "reasonable time."

### *Request for Reimbursement*

67. Parents may be entitled to reimbursement for the costs of services they have procured for their child when the school district has failed to provide a FAPE and the private services procured are determined to be appropriate under the IDEA and reasonably calculated to provide educational benefit to the child.

68. The 2005-2006 school year was Student's eighth grade year. Student did not attend the fall 2005 semester at Bancroft Middle School. Instead, Student's parents placed him in a 12-week program at the Lindamood Bell clinic in Newport Beach, which ran from September 6, 2005 until November 22, 2005. Student's parents incurred a cost of \$21,330.00 for this program, which the parents paid with a loan they obtained from Sallie Mae.<sup>13</sup>

69. As discussed in Factual Finding 26, the District operates its own Lindamood Bell programs at the elementary, middle, and high school levels. The main difference between the District's program and the private clinic program is that the District's program is provided in a small group setting while the private clinic program is a one-to-one setting.<sup>14</sup> However, no evidence was presented that Student required a Lindamood Bell program in a one-to-one setting. During the summer of 2005, Student attended the District's summer Lindamood Bell program at Stanford Middle School, which was provided in a small group setting. The Lindamood Bell program manuals indicate that a small group setting is appropriate to implement the program, in addition to clinical/one-to-one and classroom settings.

70. The private 12-week program for which Mother seeks reimbursement consisted of more services than was actually recommended by the Newport Beach Lindamood Bell clinic. In the private 12-week program, Student received six hours of services per day, five days per week. However, when Student was assessed at the Newport Beach clinic on August 4, 2005, the clinic recommended a program of only four hours per day, five days per week.

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<sup>13</sup> According to Mother's testimony, Student's parents also incurred \$1,000.00 of loan costs and the costs of providing transportation to and from the private clinic. However, no documentation was offered to corroborate this testimony.

<sup>14</sup> The District submitted a written declaration by Cynthia Galloway, who was one of Student's teachers at the District's Lindamood Bell summer program at Stanford Middle School. In the declaration, Ms. Galloway indicated she worked with Student on a one-to-one basis in the reading program (five times, 10-15 minutes each time), and also when she needed to re-focus or re-direct him, which occurred daily.

71. Student's evidence is not persuasive that the program at the Newport Beach clinic was necessary to meet his unique educational needs. The District had a Lindamood Bell program available at Stanford Middle School which was appropriate for Student and offered the same programs that were recommended by the Newport Beach clinic (i.e., Visualizing and Verbalizing and Seeing Stars). Moreover, on September 6, 2005, the District offered Student additional Lindamood Bell services at Stanford Middle School in a full-day, six week intensive program, including transportation, and also offered to hold an IEP meeting at the end of the six-week program to discuss Student's progress.

72. Student's parents are not entitled to reimbursement for the cost of the 12-week program at the Newport Beach clinic.

#### *Determination of Witness Credibility*

73. Mother's testimony was not credible or persuasive. At times, she seemed irritated and evasive when questioned by the attorney for the District. Some of her testimony was refuted by documentary evidence and other witness testimony. For example, Mother testified she did not request Student to be taken out of RSP English at the January 23, 2004 addendum IEP meeting. Yet Mother signed the January 23, 2004 addendum IEP, which stated "parent requesting [Student] be mainstreamed" and also indicated RSP English and reading would be changed to general education classes. Mother also signed the March 25, 2004 annual IEP, even though it did not include RSP English or written language, and no evidence was presented she raised a concern about this at the March 25, 2004 meeting. Mother's testimony was also refuted by Melissa James, Student's teacher who was present at the January 23, 2004 addendum IEP meeting. Ms. James testified credibly that Mother felt Student did not need special education and wanted him removed from RSP English. Another example is Mother's testimony that she was not aware of her rights as Student's parent until she hired an attorney and advocate. This testimony was not persuasive. Mother is a preschool teacher, and her son has been receiving special education services since he was four years old. Mother has attended numerous IEP meetings, has requested IEP meetings herself to make changes to Student's program and services, and has communicated with Student's teachers. Student's contention that the District "capitalized" on Mother's lack of knowledge is not persuasive. When Mother testified she did not understand the rights contained in the "parental rights" booklet provided by the District, she was unable to specify which rights were not understandable to her. Also, Mother's testimony that she was not aware the "parental rights" applied to her was not credible. Finally, Mother's testimony that she did not have a problem with her son being in special education was not persuasive, based on her actions to reduce or remove Student's special education services and the testimony of several witnesses, including Ms. James, Ms. Walker, and Mr. Sullivan, of their impressions that Mother did not want her son being identified as a special education child.

## LEGAL CONCLUSIONS

### *Applicable Law*

1. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A)<sup>15</sup>; Ed. Code, § 56000.<sup>16</sup>) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(8); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined, in pertinent part, as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(22); Ed. Code, § 56031.) Special education related services include, in pertinent part, developmental, corrective, and supportive services, such as speech-language pathology services and occupational therapy, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.)

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp.198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

3. To determine whether a school district offered a student a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit.

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<sup>15</sup> The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The allegations in this matter involve IEPs developed prior to July 1, 2005. Accordingly, the IDEA will be applied and all citations to Title 20 United States Code are to sections in effect prior to July 1, 2005. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 fn. 1.)

<sup>16</sup> The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. All citations to the Education Code are to sections in effect prior to October 7, 2005.

4. In addition to these substantive requirements, the Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. Thus, the analysis of whether a student has been provided a FAPE is two-fold: (1) the school district must comply with the procedural requirements of the IDEA, and (2) the IEP must be reasonably calculated to provide the child with educational benefits. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, *supra*, 458 U.S. at pp. 206-207.)

5. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 892.) To constitute a denial of a FAPE, procedural violations must result in deprivation of educational benefit or a serious infringement of the parents' opportunity to participate in the IEP process. (*Ibid.*)

6. As the petitioner, Student has the burden of proving at an administrative hearing the essential elements of his claims. (*Schaffer v. Weast* (2005) 546 U.S. \_\_\_\_ [126 S.Ct. 528, 163 L. Ed. 2d 387].)

7. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, special education students must be reassessed every three years or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment and that a new IEP be developed. (Ed. Code, § 56381.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for the student. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subdiv. (e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subd. (a), (b).) As part of any reassessment, the IEP team shall review existing assessment data and, on the basis of that data, identify what additional data, if any, is necessary to determine whether the pupil continues to have a disability, the pupil's present levels of performance and educational needs, whether the pupil continues to need special education and related services, and whether any additions or modifications to the educational program are needed to enable the pupil to meet his annual IEP goals. (Ed. Code § 56381(b); 34 C.F.R. § 300.533(a).) If the IEP team determines that no additional data is needed to determine whether the pupil continues to have an eligible disability, the school district is not required to conduct additional assessments unless requested by the pupil's parents. (20 U.S.C. § 1414(c)(4); 34 C.F.R. § 300.533(d); Ed. Code, § 56381(d).)

8. The IDEA regulations impose some requirements on how standardized tests may be administered, such as that the tests must be validated for the specific purpose for which they are used. (34 C.F.R. § 300.532(c)(1)(i).) However, neither State nor federal laws specifically require standardized testing as part of an assessment in all areas of suspected disability. Rather, the IDEA regulations provide the LEA shall administer tests or other

evaluation materials as may be needed to produce data needed to determine the child's disability, present levels of performance, and needs. (34 C.F.R. § 300.533(a), (c); § 300.532.)

9. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) Although a child's progress toward the IEP's goals may be considered, whether an IEP offers a FAPE must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*; *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

10. A parent must be provided prior written notice when a school district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); Ed. Code § 56500.4.) The notice must include a description of the action refused by the school district, an explanation of why the district refuses to take the action, a description of each evaluation procedure, test, record, or report used as a basis for the refused action, a description of any other factors relevant to the district's refusal, a statement that the parents have protection under the procedural safeguards of IDEA, and sources for the parents to contact to obtain assistance. (20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b).)

11. When a school district denies a student a FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359.) "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496; *see also* 20 U.S.C. § 1415(i).) Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services procured are determined to be appropriate under the IDEA and reasonably calculated to provide educational benefit to the child. (*Burlington, supra.*)

### *Determination of Issues*

*Issue No. 1: Did the District appropriately assess Student in all areas of suspected disability for the 2002-2003, 2003-2004, and 2004-2005 school years, and conduct an appropriate triennial assessment in 2004?*

12. Based on Factual Findings 4-29 and Legal Conclusion 7, the District appropriately assessed Student in all areas of suspected disability for the three school years at issue. Student's evidence failed to show that conditions in the three school years at issue warranted further assessments by the District, or that further assessments were requested by

Student's parents or teachers. No persuasive evidence was presented that Student had a suspected disability or area of need that had not been identified by the District.

13. Based on Factual Findings 4-16 and 17-18 and Legal Conclusions 7 and 8, the District's March 2004 triennial assessment was appropriate and complied with applicable legal requirements. No standardized testing was required for the assessment. The "Summary of three-year review" prepared by Ms. Holliday and provided to Mother stated, in part, "if you have any additional concerns you may request additional assessments at any time." No assessments were requested by Mother. Nor did Mother raise concerns about further assessments at the March 25, 2004 triennial IEP meeting.

*Issue No. 2: For the three school years at issue, did the District deny Student a free appropriate public education by failing to identify and address his unique educational needs in a manner that allowed him to make appropriate educational progress?*

14. Based on Factual Findings 31-39 and Legal Conclusions 2, 3 and 9, in the operative IEP for the 2002-2003 school year, the District identified and addressed Student's unique educational needs in a manner that allowed him to make appropriate educational progress, and thereby provided Student a FAPE.

15. Based on Factual Findings 40-47 and Legal Conclusions 2, 3 and 9, in the operative IEP for the 2003-2004 school year, the District identified and addressed Student's unique educational needs in a manner that allowed him to make appropriate educational progress, and thereby provided Student a FAPE.

16. Based on Factual Findings 48-62 and Legal Conclusions 2, 3 and 9, in the operative IEP for the 2004-2005 school year, the District identified and addressed Student's unique educational needs in a manner that allowed him to make appropriate educational progress, and thereby provided Student a FAPE.

17. The evidence established that Student's IEPs conferred a meaningful educational benefit. Student offered no legal authority to support his assertion that below grade-level work or a failure to make year-for-year progress established that his IEPs did not provide educational benefit. The relevant inquiry is not whether Student's IEP provided an optimal benefit, but rather whether it provided a meaningful benefit. (*M.A. v. Voorhees Township Bd. of Educ.* (D.N.J. 2002) 202 F. Supp. 2d 345.) One factor in determining educational benefit is "the achievement of passing marks and advancement from grade to grade." (*Rowley, supra*, 458 U.S. at 207, fn. 28.) Another factor in determining educational benefit is "whether the child makes progress towards the goals set forth in her IEP." (*County of San Diego v. CSEHO, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467.) In this case, Student's advancement from grade to grade and his progress on his IEP goals established he received meaningful educational benefit from the IEPs developed by the District for the three school years at issue.



*Issue No. 3: Did the District comply with the procedural requirements of IDEA in providing Student's parents with prior written notice when it declined their August 11, 2005, request for an intensive Lindamood Bell Learning Process program?*

18. Based on Factual Findings 64-66 and Legal Conclusion 10, the District complied with the procedural requirements of IDEA regarding prior written notice. The District's September 6, 2005, letter was a sufficient "prior written notice" of its decision to reject the reimbursement request of Student's parents, and was provided within a "reasonable time" of the request.

*Issue No. 4: Are Student's parents entitled to reimbursement of their expenses incurred for the Lindamood Bell Learning Process program during the 2004-2005 and 2005-2006 school years?*

19. Based on Factual Findings 68-72 and Legal Conclusion 11, Student's parents are not entitled to reimbursement of the costs incurred for the Lindamood Bell program at the Newport Beach clinic. Because the District did not deny Student a FAPE for the school years at issue, there is no legal basis for an award of reimbursement. In addition, Student's evidence was not persuasive that the program at the private Newport Beach clinic was more appropriate and necessary to address his needs than the District's Lindamood Bell program.

#### ORDER

All of Student's requests for relief are denied.

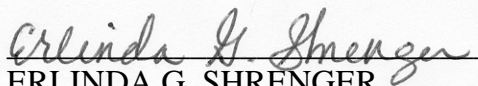
#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues heard and decided.

#### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505(k).)

DATED: September 27, 2006



ERLINDA G. SHRENGER  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division